Professional Solutions Sdn Bhd v Pentadbir Tanah Seremban & Anor and another case

HIGH COURT (SEREMBAN) — JUDICIAL REVIEW NOS NA-25–12–08 OF 2017 AND NA-25–2–05 OF 2018
ABU BAKAR JAIS J
22 JANUARY 2019

Civil Procedure — Stay of proceedings — Application for — Whether sufficient reasons shown warranting stay — Whether special circumstances existed — Whether acquisition of land by respondent challengeable — Whether respondent acted mala fide — Whether applicant had right to object land enquiry by respondent — Whether land acquisition concluded

The main actions of the present case were two judicial review applications filed by the applicant against the respondents and the intervener. These two judicial review applications were pertaining to the challenge made by the applicant against the first and second respondents' action in statutorily acquiring the land of the applicant. Pending the disposal of the judicial review applications, the applicant filed an application for stay of proceeding and a restraining order against the first and second respondents in acquiring the said land. The present application also included a prayer for an order that the first respondent and intervener's employees or agents be restrained from entering the said land and dealing in any manner with regard to the same. By a letter dated 13 July 2017 from the first respondent to the applicant, the former informed the latter that it intended to commence enquiry pursuant to s 3(1)(b) of the Land Acquisition Act 1960 in acquiring the applicant's land. The land was intended to be acquired after an application by the intervener for a road reserve for a housing estate developed by the same. Subsequently the applicant filed the judicial review applications to challenge the action in acquiring the said land. On the same date, enquiry pertaining to the land was adjourned pending the disposal of the judicial review applications. On 24 April 2018, the applicant was served with Form K pursuant to s 22 of the Land Acquisition Act 1960 for the first respondent to take possession of the land with a compensation value of RM344,860 which would be paid to the applicant. The main issue by the applicant was whether there was sufficient reason to show that the stay of proceeding should be granted.

Held, dismissing the applicant's application for stay and restraining order with costs:

(1) The special circumstances as understood by the applicant was far from being truly special circumstances, as even if the applicant was successful

in the two judicial review applications, its grievance could still be addressed by awarding damages. The court was of the view that there were no special circumstances to merit a stay or the restraining order requested (see paras 49–50).

(2) The applicant could not be granted the stay and restraining order simply because the respondents and intervener could not be injuncted. It did not really matter even if it was true there was no real urgency to acquire the land. The contention in the present case was more suited to be argued for the judicial review applications and not the current application for stay and restraining order. This was because the argument in the present case actually was to challenge the acquisition of the land itself (see para 52).

(3) On the issue of the applicant argued that the first respondent acted mala fide as a notice informing the applicant for the continuation of the enquiry was not issued, that argument suited for the judicial review applications. It would render the hearing of the judicial review later useless if the points that should be raised there were raised and decided in the present case. In an application for a stay pending the determination of a court's case, the merits of that case were not an issue. It did not matter whether the case would be likely concluded in favour of the applicant for stay (see paras 55–57).

(4) When the first and second respondents proceeded with the land enquiry, there was no court order whatsoever preventing both to act as they did. It may be a case both respondents knew of the judicial review applications filed by the applicant. But to restrain a party from carrying out its routine business without a court order under the circumstances, was nothing short of a draconian action. As long as there was no court order at that point of time putting a stop to any of their actions, it was perfectly legitimate for the first and second respondents to proceed in acquiring the applicant's land (see paras 58–60).

(5) In deciding the issue of whether issuance of Form K meant the acquisition of land concluded, there were two different decisions of the Court of Appeal, as such, the High Court was at liberty to choose which of the two Court of Appeal's decisions to be followed. It ought to be noted that the merits of this argument could not in any manner displace the fact that both the respondents and intervener could not be injuncted or restrained. The case of *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 was followed because the Court of Appeal realised and acknowledged that an endorsement of the memorial was a mere formality and the omission to do so did not invalidate the acquisition process. The present court could not be faulted in choosing one out of the two Court of Appeal decisions as explained in the Federal Court's case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (see paras 64–65).

[Bahasa Malaysia summary

Tindakan-tindakan utama dalam kes ini adalah dua permohonan semakan kehakiman yang difailkan oleh pemohon terhadap responden-responden dan pencelah. Dua permohonan semakan kehakiman tersebut adalah berkaitan cabaran yang dibuat oleh pemohon terhadap tindakan responden-responden pertama dan kedua untuk memperoleh secara statutori tanah pemohon. Sementara menunggu selesai permohonan-permohonan semakan kehakiman tersebut, pemohon telah memfailkan permohonan penggantungan prosiding dan perintah larangan terhadap responden-responden pertama dan kedua untuk memperoleh tanah tersebut. Permohonan ini juga termasuk permohonan untuk perintah agar responden pertama dan pekerja atau ejen pencelah dihalang daripada memasuki tanah tersebut dan berurusan dalam apa cara berkaitan yang sama. Melalui surat bertarikh 13 Julai 2017 daripada responden pertama kepada pemohon, responden pertama memberitahu pemohon bahawa ia berniat untuk memulakan siasatan menurut s 3(1)(b) Akta Pengambilan Tanah 1960 untuk memperoleh tanah pemohon. Tanah tersebut bertujuan untuk diperoleh selepas permohonan oleh pencelah untuk jalan rizab bagi estet perumahan yang dimajukan olehnya. Berikutan itu pemohon telah memfailkan permohonan semakan kehakiman tersebut untuk mencabar tindakan memperoleh tanah tersebut. Pada tarikh sama, siasatan berkaitan tanah tersebut telah ditangguhkan sementara menunggu selesainya permohonan semakan kehakiman terebut. Pada 24 April 2018, pemohon telah disampaikan dengan Borang K menurut s 22 Akta Pengambilan Tanah 1960 agar responden pertama mengambil milikan tanah tersebut dengan nilai pampasan RM344,860 yang akan dibayar kepada pemohon. Isu utama oleh pemohon adalah sama ada ia sebab yang mencukupi untuk menunjukkan bahawa penggantungan prosiding patut diberikan.

Diputuskan, menolak permohonan pemohon untuk penggantungan dan perintah larangan dengan kos:

(1) Keadaan khas yang difahami oleh pemohon sebenarnya bukan keadaan khas, walaupun jika pemohon berjaya dalam dua permohonan semakan kehakiman itu, kiraannya masih boleh dikemukakan dengan mengawardkan ganti rugi. Mahkamah berpendapat bahawa tiada keadaan khas untuk mewajarkan satu penggantungan atau perintah larangan sepertimana dipohon (lihat perenggan 49–50).

(2) Pemohon tidak boleh diberikan penggantungan dan perintah larangan hanya kerana responden-responden dan pencelah tidak boleh dihalang. Ia tidak penting jika sebenarnya tiada keadaan terdesak untuk memperoleh tanah tersebut. Hujah dalam kes ini lebih sesuai dihujahkan untuk permohonan semakan kehakiman dan bukan permohonan ini untuk penggantungan dan perintah larangan. Ini adalah kerana hujah

dalam kes ini sebenarnya adalah untuk mencabar pemerolehan tanah itu sendiri (lihat perenggan 52).

(3) Berhubung isu pemohon berhujah bahawa responden pertama telah bertindak mala fide kerana notis untuk memberitahu pemohon tentang sambungan siasatan itu tidak dikeluarkan, bahawa hujah itu sesuai untuk permohonan semakan kehakiman. Ia menjadikan perbicaraan semakan kehakiman itu tidak berguna jika perkara-perkara yang patut ditimbulkan telah ditimbulkan dan diputuskan dalam kes ini. Dalam permohonan untuk penggantungn sementara menunggu keputusan kes mahkamah, merit kes tersebut bukan satu isu. Ia tidak penting sama ada kes itu berkemungkinan akan diputuskan menyebelahi pemohon untuk penggantungan (lihat perenggan 55–57).

(4) Apabila responden-responden pertama dan kedua meneruskan dengan siasatan tanah, tiada perintah mahkamah yang menghalang mereka untuk bertindak sebagaimana mereka lakukan. Ia mungkin suatu keadaan di mana kedua-dua responden mengetahui tentang permohonan-permohonan semakan kehakiman tersebut yang difailkan oleh pemohon. Namun untuk menghalang mana-mana pihak daripada menjalankan perniagaan rutinnya tanpa perintah mahkamah dalam keadaa tersebut, suatu tindakan yang drakonian. Selagi tiada perintah mahkamah pada masa itu untuk menghentikan tindakan mereka, ia adalah sah untuk responden-responden pertama dan kedua untuk memperoleh tanah pemohon (lihat perenggan 58–60).

(5) Dalam memutuskan isu sama ada keluaran Borang K bermaksud pemerolehan tanah selesai, terdapat dua keputusan Mahkamah Rayuan yang berbeza, oleh itu, Mahkamah Tinggi bebas untuk memilih mana-mana daripada dua keputusan Mahkamah Rayuan itu untuk diikut. Ia patut ditekankan bahawa merit hujah ini tidak patut dalam apa cara menggantikan fakta bahawa kedua-dua responden dan pencelah tidak boleh disekat atau dihalang. Kes *Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor* [2015] 2 MLJ 126 telah diikut kerana Mahkamah Rayuan menyedari dan mengakui bahawa pengesahan peringatan itu hanya suatu formality dan peninggalan berbuat demikian tidak menjadikan proses pemeroleh menjadi tidak sah. Kes ini tidak boleh disalahkan kerana memilih salah satu daripada dua keputusan Mahkamah Rayuan sebagaimana dijelaskan dalam kes Mahkamah Persekutuan *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 (lihat perenggan 64–65).]

Notes

For cases on application for stay of proceedings, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9008–9058.

Cases referred to

Amakannu a/p Veerapan & Ors v Mayland Development Sdn Bhd [2011] 8 MLJ 682, HC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Ishmael Lim bin Abdullah @ Lim Keng Chew v Pesuruhjaya Tanah Persekutuan & Anor [2015] 2 MLJ 126; [2014] 7 CLJ 882, CA (folld)
Kosma Palm Oil Mill Sdn Bhd & Ors vs Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)
Leong Poh Shee v Ng Kat Chong [1966] 1 MLJ 86 (refd)
Ng Hee Thoong & Anor v PP [1995] 1 MLJ 281, CA (refd)
Shinning Crest Sdn Bhd (appointed receiver and manager) & Ors v Malaysia Building Society Bhd [2018] 10 MLJ 491, HC (refd)
Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors [2013] 3 MLJ 676; [2013] 3 CLJ 1115, CA (refd)
United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors [2018] 1 MLJ 661; [2017] 8 CLJ 173, CA (refd)

Legislation referred to

Government Proceedings Act 1956 s 29
Land Acquisition Act 1960 ss 3(1)(b), 12(4), 22, Forms H, K
Rules of Court 2012 O 53 r 2(3)
Specific Relief Act 1950 s 54, 54(d)

Rajveen Kaur (Pretam Singh, Nor & Co) for the applicant.
Rozaimah Adnan (Attorney General's Chambers) for the first and second respondents.
Kesavan Krishnan (Othman Hashim & Co) for the intervener.

Abu Bakar Jais J:

A right delayed is a right denied

— Martin Luther King Jr

INTRODUCTION

[1] The main actions of this case are two judicial review applications filed by the applicant against the respondents and intervener. These two judicial review applications pertain to the challenge made by the applicant against the first and second respondents' action in statutorily acquiring the land of the applicant.

[2] Pending the disposal of the judicial review applications, the applicant filed an application for stay of proceeding and a restraining order against the first and second respondents in acquiring the said land. This application also

includes a prayer for an order that the first respondent and intervener's employees or agents be restrained from entering the said land and dealing in any manner with regard to the same. This written judgment relates to this application.

SALIENT FACTS

[3] By a letter dated 13 July 2017 from the first respondent to the applicant, the former informed the latter that it intends to commence enquiry pursuant to s 3(1)(b) of the Land Acquisition Act 1960 in acquiring the applicant's land.

[4] The land is intended to be acquired after an application by the intervener for a road reserve for a housing estate developed by the same.

[5] Subsequently the applicant filed the judicial review applications to challenge the action in acquiring the said land. On the same date, enquiry pertaining to the land was adjourned pending the disposal of the judicial review applications.

[6] On 24 April 2018, the applicant was served with Form K pursuant to s 22 of the Land Acquisition Act 1960 for the first respondent to take possession of the land with a compensation value of RM 344,860 which will be paid to the applicant.

SUMMARY OF THE APPLICANT'S SUBMISSION

[7] There are special circumstances to merit the present stay application. The judicial review applications will be rendered nugatory if the stay is not given.

[8] Form K that allows the third respondent to enter the land should be stayed pending the disposal of the judicial review applications.

[9] The applicant's present application, if not allowed will cause irreparable damage to the applicant.

[10] The applicant had been given planning permission by the local authority and if stay is not granted the applicant would be prejudiced in executing development plan for the whole of the applicant's land.

[11] The applicant would suffer irreparable damage and would not be able to claim the land even if the judicial review applications are decided in its favour if the stay is not granted.

A **[12]** There is no urgency for the intervener to enter the land as there is a different access to its housing estate.

[13] The intervener admitted that the acquisition of the land is not for public purpose but for it to be used as main road to its housing estate.

B

[14] The acquisition is not mainly for public purpose but for the economic and financial benefits of the intervener.

C **[15]** There is no planning permission shown by the intervener. Therefore, the same will not be prejudiced if the stay is allowed.

[16] The stay if not granted will prejudice the applicant as its land will be divided into two and as a result this will depreciate its value.

D

[17] There are merits for the judicial review applications as the first respondent acted mala fide in not informing the applicant with regard to the continuation of the enquiry for the acquisition.

E

[18] The deceiving manner in which both respondents and intervener had acted in their failure to be transparent is mala fide to the applicant which is deprived of its legitimate right to the land.

F **[19]** The applicant had been denied the right to challenge the acquisition when the first respondent is aware of the former applications for judicial review which are yet to be heard in court.

[20] There is no note of evidence in the land enquiries to support the contention that all actions pertaining to the acquisition had ended and there is nothing to be stayed. It is mandatory for the first respondent to record the minutes of the enquiries. The failure to show the note of evidence amounts to mala fide.

G

H

[21] There is no rebuttal in the affidavits of the respondents on the assertions by the applicant, hence what is asserted ought to be accepted.

[22] There is procedural impropriety in that the second respondent proceeded to acquire the land based on a valuation report prepared three years before.

I

[23] The first and second respondents are still with jurisdiction to enquire the acquisition and not functus officio.

[24] The endorsement of Form K on the issued document of title ('IDT') does not mean that formal possession of the land is completed by the first and second respondents. This is only completed when Form K is endorsed on the memorial or endorsement made on the IDT. **A**

[25] There is a difference between IDT and registered document of title ('RDT'). IDT is issued to the owner of the land while RDT is kept at the land office. The applicant has not been handed the IDT. **B**

[26] This court has jurisdiction to invalidate the endorsement on Form K and to take vacant possession of the land. **C**

[27] The stay is important so that the intervener will not sell the land to bona fide purchasers and later say that these purchasers would be prejudiced in the event the land is returned to the applicant. **D**

[28] The first and second respondent is not functus officio as there is still no endorsement on the memorial or endorsement on the applicant's IDT.

SUMMARY OF THE FIRST AND SECOND RESPONDENTS' SUBMISSION **E**

[29] When the first respondent proceeded to acquire the land, the applicant failed to get court order to stop the process ie the enquiry to acquire the land, though the latter were present with its legal counsel at least on two occasions during the enquiries. **F**

[30] On the date to determine the price of the land, the applicant and its legal counsel walked out from the enquiry protesting the land was not acquired for public purpose. The price of the land was determined then and Form H, a notice offering the land price was handed to the respondent on 30 December 2017. **G**

[31] With the issuance of Form K to the applicant as acknowledged by the same, the land now belongs to the government. With the issuance of Form K too, all actions in acquiring the land had ended and there is nothing to be stayed. **H**

SUMMARY OF THE INTERVENER'S SUBMISSION **I**

[32] The land has lawfully been taken by the government with the issuance of Form K and the intervener was given permission by the former to enter the land at any time.

[33] The restraining order requested by the applicant amounts to an injunction which cannot be granted under the circumstances of the present case. Further, even the requirements of an injunction had not been fulfilled by the applicant.

THE COURT'S FINDINGS AND ANALYSIS

[34] First, uppermost to be considered is the ingenuity of the applicant. Take notice that the applicant knew fully well that had it applied for an injunction against the respondents and intervener, the same would be refused outright because of some statutory provisions and case law which will be explained shortly. To overcome this, the applicant couched its application instead for stay of the proceeding to acquire the land pending the disposal of the judicial review applications. It seems that the applicant is attempting to pull wool over the eyes of the court. Instead of calling it an outright injunction, the applicant watered it down to say it is an application for a stay.

[35] On that score, there is a need to truly appreciate the nature of the applicant's application as it stands. As pointed out, it is an application for a stay and a restraining order. It cannot be doubted that this application essentially is an application in the nature of injunction. This injunction is applied to stop or restrain the process of acquiring the applicant's land. It is to stop the duty and work of the first respondent as a government's servant or body and the operation of the second respondent as a government itself. In any event, call it an injunction or stay, the effect is still the same. It is to restrain the government from acquiring the land.

[36] Further, it must also be appreciated, as explained, that this application arose from two judicial review applications. Hence the provisions governing such application must be referred. And since the stay and restraining order application is founded on judicial review applications, can injunction be granted against the Land Administrator of Seremban as first respondent and Government of Negeri Sembilan as second respondent?

[37] In answering this question, first the provision governing judicial review application is O 53 r 2(3) of the Rules of Court 2012 ('the RC') that states as follows:

> Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of monetary compensation.
>
> *Provided that the power to grant an injunction shall be exercised in accordance with the provision of* section 29 of the Government Proceedings Act and section 54 of the Specific Relief Act 1950. (Emphasis added.)

[38] The above provision as seen can only applied subject to s 29 of the Government Proceedings Act 1956 ('the GPA') and s 54 of the Specific Relief Act 1950 ('the SRA'). A

Section 29 of the GPA reads as follows:

> (1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: B
>
> Provided that —
>
> (a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and C
>
> (b) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property or to the possession thereof. D
>
> (2) *The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government* if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government. (Emphasis added.) E

Section 54 of the SRA in particular s 54(d) of the same reads as follows: F

> An injunction cannot be granted —
>
> (d) *to interfere with the public duties of any department of any Government in Malaysia,* or with the sovereign acts of a foreign Government ... (Emphasis added.)

[39] It is quite clear that the applicant sought to injunct the first and second respondents by filing the present application for stay of proceeding and a restraining order against the first and second respondents for its actions to acquire the said land. But the above two statutory provisions do not allow such application. Both respondents could rely on these provisions to deny the applicant's present application. G H

[40] In support of this proposition both respondents could also rely on the case *Tan Bun Teet & Ors v Menteri Sains, Teknologi dan Inovasi Malaysia & Ors* [2013] 3 MLJ 676; [2013] 3 CLJ 1115 decided by the Court of Appeal by a strong coram comprising Ramly Ali JCA, Azahar Mohamed JCA and Aziah Ali JCA, as they were then where it was held as follows: I

> [13] In the first place, we are of the view that in judicial review proceedings an application for an injunction can only be made pursuant to O 53 r 2(3) of the Rules

of Court 2012, which provides as follows:

> Upon the hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any court orders, including an order of injunction or monetary compensation.

Hence, we are of the view that an application for an injunction could only be made at the substantive judicial review hearing and not before it.

[14] But that is not all. An injunction, interim/interlocutory or permanent, cannot be granted against the government under s 29 of the GPA and under s 54 of the SPA. The authority to support this proposition can be found in the decision of our then Supreme Court in *Lim Kit Siang v United Engineers (M) Bhd & Ors* [1988] 2 MLJ 12; [1987] 2 CLJ 195; [1987] CLJ Rep 170 (SC). In particular, the relevant passage from the judgment states:

> This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of 'restraining' the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

[15] The principle of law enunciated above has been reaffirmed by the Court of Appeal in *Superintendent of Lands and Surveys, Kuching Division & Ors v Kuching Waterfront Development Sdn Bhd* [2009] 5 MLJ 607; [2009] 6 CLJ 751.

[16] It follows from this, after giving due considerations to the submissions of all parties, if the relief sought is granted, this will interfere with the public duty of the second respondent under the AELA and as such, s 29 of the GPA protects the second respondent, being a public authority, from any form of injunctive orders.

[41] There can be no doubt that the above case conclusively would mean that the applicant's present application must not be allowed. In addition the above case is also authority to deny the application even as against the intervener as it states:

> *Similarly, the court has no jurisdiction to grant an injunction against a private litigant* if the injunction would have the effect of restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country. (Emphasis added.)

[42] Injuncting the intervener by restraining it from entering the land, means restraining the first and second respondents too because effectively if the injunction is granted against the intervener, that would mean the efforts of the first and second respondents in acquiring the land is pointless as work cannot be commenced for the road reserve as the same is supposed to be used for the residents of the housing estate developed by the intervener.

[43] The statutory provisions and case law as highlighted would be more than sufficient to determine the outcome of the applicant's present application. There is strictly speaking, no further need to address the other arguments of all parties in this case. However for the sake of completeness, the other submissions of all parties would be addressed to assist in understanding that indeed the applicant's application cannot be allowed.

[44] First, according to the applicant, the stay pending disposal of the judicial review applications ought to be granted as the applicant has special circumstances which include the alleged fact that the judicial review applications will be rendered pointless if the stay is not granted. And also the applicant asserted that if the stay is not given and the same succeed in the judicial review applications, it would not be able to execute the development for the whole of the applicant's land. This is not to mention the contention by the applicant it would suffer irreparable damage and would not be able to claim the land even if the judicial review applications are decided in its favour if the stay is not granted.

[45] At the risk of repetition, it must be pointed that the contentions above regarding special circumstances should not in any way affect the fact and law explained earlier that in any event the applicant cannot injunct and restrain the respondents and interverner.

[46] In addressing the contentions in respect of special circumstances, first it is relevant to note the subject matter of the dispute. It is in respect of the land that is acquired. No matter how substantial is the value of the land, it is still in any event a matter with economic value. There is nothing more than pecuniary interest at stake.

[47] Therefore even if the applicant is successful in the judicial review applications, damages should be adequate remedy, no matter how huge the amount might be. The special circumstances in essence in the mind of the applicant, still boils down to dollars and cents. In fact, in the judicial review applications, the court is empowered to award monetary compensation as stated under O 53 r 2(3) of the RC that reads as follows:

> Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the same or *make any orders including … monetary compensation …* (Emphasis added.)

[48] The courts in this regard, are not confined just to consider the position of a party asserting special circumstances are in its favour but the position of the opposing side can also be taken into account to determine whether there are indeed special circumstances as asserted. A case in point is *Amakannu a/p Veerapan & Ors v Mayland Development Sdn Bhd* [2011] 8 MLJ 682 where the

plaintiffs applied for an injunction to restrain the defendant from demolishing the plaintiffs' houses. Zabariah Mohd Yusof JC (as she then was), now JCA refused the application and said as follows:

> There are no special circumstances adduced by the Plaintiff that can exempt the plaintiffs from giving an undertaking as to damages in the event the granting of the injunction against the defendant was wrong. *This is in direct opposition to the defendant who is in a position to compensate for damages to the plaintiffs in the event the injunction is not granted.* (Emphasis added.)

[49] Therefore, the special circumstances as understood by the applicant is far from being truly special circumstances, as even if the applicant is successful in the two judicial review applications, its grievance could still be addressed by awarding damages.

[50] Based on the above reason, this court is of the view that there is no special circumstances to merit a stay or the restraining order requested.

[51] On that note, it is also wise to remember that in considering special circumstances, it is always the full discretion of the deciding court whether a stay ought to be granted. Raja Azlan Shah J in *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86 quoted with approval *Halsbury's Laws of England* (3rd Ed), Vol 16, para 51 at p 35 that states as follows:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances ...

[52] The applicant also contended that there is no urgency to acquire the land having regard to the fact that there is an alternative route leading to housing estate developed by the intervener. First, on this submission, even if this indeed is the case, this would still mean that the applicant cannot be granted the stay and restraining order simply because the respondents and intervener cannot be injuncted as explained earlier. The statutory provisions and case law highlighted earlier, render it clear it does not really matter even if it is true there is no real urgency to acquire the land. Second, the contention here is more suited to be argued for the judicial review applications and not the current application for stay and restraining order. This is because this argument actually is to challenge the acquisition of the land itself.

[53] The same could be said of the applicant's contention that the acquisition of the land is not for public purpose but for the housing estate developed by the intervener and for the economic profit of the same. This is also more appropriate to be raised in the judicial review applications and not

the present application. As indeed whether the acquisition is for public purpose, should be a point of contention in the judicial review applications and not in this application.

[54] The same applies for the applicant's argument that it will be prejudiced if the stay is not given. The applicant submitted it will be prejudiced as the acquisition of the land would mean the applicant's land will be severed into two and there would be substantial depreciation of the remaining land of the applicant. This too ought to be a point of contention in the judicial review applications challenging the acquisition but not in the present application.

[55] Further the applicant argued that the first respondent acted mala fide as a notice informing the applicant for the continuation of the enquiry was not issued. This is also an argument suited for the judicial review applications and not now.

[56] In short, this court should not be too carried away with the arguments as indicated above. Not only because it is more appropriate to raise it at the hearing of the judicial review applications but this would also mean if this court is to decide on these contentions now, it would render the hearing of the judicial review later useless as the points that should be raised there have been raised and decided by this court now. Take for example the last argument above where it is contended that a notice informing the applicant for the continuation of the enquiry should have been issued. If this court decides that issue in favour of the applicant now, that would mean the merits of the judicial review has already been decided by this court well before the hearing of the judicial review applications itself.

[57] On this note too, is should be reminded that in an application for a stay pending the determination of a court's case, the merits of that case is not an issue. It does not matter whether the case would be likely concluded in favour of the applicant for stay. This has long been concluded in a case I handled as counsel at the Federal Court although at the losing end ie *Kosma Palm Oil Mill Sdn Bhd & Ors vs Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 where it is held as follows:

> There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if the stay was referred is the most common one. *The merits of a party's case in a stay application is not a relevant matter for consideration.* (Emphasis added.)

[58] Another contention of the applicant is that it had been denied the right to object in the land enquiry despite the respondents knowing the former had applied for judicial review application to challenge the land acquisition. On this argument, it must be highlighted that when the first and second

respondents proceeded with the land enquiry, there was no court order whatsoever preventing both to act as they did. It may be a case both respondents knew of the judicial review applications filed by the applicant. But to restrain a party from carrying out its routine business without a court order under the circumstances such as in this case, is nothing short of a draconian action. As long as there was no court order at that point of time putting a stop to any of their actions, it is perfectly legitimate for the first and second respondents to proceed in acquiring the applicant's land. Similarly in *Shinning Crest Sdn Bhd (appointed receiver and manager) & Ors v Malaysia Building Society Bhd* [2018] 10 MLJ 491 part of the judgment considered the position there was no court order staying the execution of a consent judgment. As there is no court order, it is status quo ante. On this note, Mohd Nazlan Ghazali J said as follows:

> Under established principles of the law, the consent judgment therefore remains valid, binding and enforceable. *There is no court order staying the execution of the consent judgment.* As such, the consent judgment entered by the parties remains absolutely intact and binding on the parties. (Emphasis added.)

[59] The applicant also contended that there is no evidence tendered to show the notes of evidence for the land enquiry. This would mean there is no evidence to suggest that the land acquisition has been completed as asserted by the first respondent. The evidence must be recorded as noted in s 12(4) of the Land Acquisition Act 1960 that states as follows:

> The Land Administrator shall record all the evidence during the enquiry.

[60] The applicant submitted this assertion has not been answered by the first respondent in the affidavit in reply. Since it is not rebutted, the applicant had admitted to this assertion based on the frequently cited Court of Appeal's case of *Ng Hee Thoong & Anor v Public Prosecutor* [1995] 1 MLJ 281.

[61] Analysing this submission, first no matter how attractive this argument, it cannot override the legal position as explained earlier that the respondents and intervener cannot be injuncted or restrained under the circumstances of the case. Second, the contention on this point is more appropriate to be argued for the judicial review applications and not for the present application for a stay pending the disposal of the judicial review applications itself. And thirdly on the authority cited earlier of *Kosma Palm Oil,* the merits of the applications for judicial review is not a consideration for the granting of a stay.

[62] There is also the argument of the first and second respondents that there is nothing to be stayed as the land acquisition is already completed with the issuance of Form K on 1 April 2018. The first and second respondents cited the Court of Appeal's case of *Ishmael Lim bin Abdullah @ Lim Keng Chew v*

Pesuruhjaya Tanah Persekutuan & Anor [2015] 2 MLJ 126; [2014] 7 CLJ 882 to support this contention and where Mah Weng Kwai JCA (as he then was) delivering judgment held as follows:

> Upon the issuance of Borang K in 1974, the land had been vested in the state authority notwithstanding that there was an omission to endorse the memorial on the title, which was a requirement under s 23 of the Act. *The requirement for an endorsement of the memorial was a formality and the omission to do so did not invalidate the acquisition process.* As such, the purported transfer of the land in 1975 to the appellant's father and in 1992 to the appellant was void and ineffective. The acquisition process had ended in 1974. (Emphasis added.)

[63] On the other hand, the applicant contended that the issuance of Form K does not mean that the land acquisition has concluded. As the endorsement in the memorial of title is still needed, the land acquisition is not completed according to the applicant. The applicant also cited a Court of Appeal's decision ie *United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & Ors* [2018] 1 MLJ 661; [2017] 8 CLJ 173 which states as follows:

> As regards the issue of Form K, we were also in agreement with the appellant's contention that such mere issuance of Form K, without the required endorsement of the memorial under ss 23 and 66 of the LAA 1960, would not be sufficient, in order to effectively or conclusively vest the title of the said land to the State Authority. The position that was taken by the learned JC had been that the title of the acquired land would vest in the state authority the moment the Form K was issued ...
>
> Reading these statutory provisions as contained in ss 23 and 66 of the LAA 1960, we were of the; view that they are express directions by the Legislature which compliance must be taken as being of a mandatory nature. The word 'shall' that was used in both sections connotes the mandatory nature of the legislative intent. As such, it was our considered view that the cumulative effect of these two sections above-quoted read with the Circular No 27/2009 has been that the endorsement of the memorial on the issue of Form K on the IDT of the acquired land is mandatory and that only upon such positive act having been done, shall the title of the said land 'vest in the State Authority as State land'. Absent that, as was recognised by the very document emanating from the Director General of Land and Mines via Circular No 27/2009, 'Memorial atau endorsan ini adalah sangat mustahak kerana selagi ianya belum dibuat, tanah itu masih dimiliki oleh tuan punya'.

[64] First, again the merits of this argument cannot in any manner displace the fact that both respondents and intervener cannot be injuncted or restrained. This has already been explained when this court showed the relevant provisions of the RC, GPA and SRA and supported by the Court of Appeal's case of *Tan Bun Teet.*

[65] Second, this court adjudicating as High Court is at liberty to choose which of the two Court of Appeal's decisions as cited by the first, and second respondents and the applicant above. In this regard, this court would choose to follow the decision in *Ishmael Lim Abdullah* because the Court of Appeal realised and acknowledged that an endorsement of the memorial was a mere formality and the omission to do so did not invalidate the acquisition process. This court cannot be faulted in choosing one out of the two decisions above as explained in the Federal Court's case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 as follows:

> ... when faced with a conflict of past decisions of Court of Appeal, or a court of co-ordinate jurisdiction, it may choose which to follow irrespective of whether either of the conflicting decisions is an earlier case or a later one ...

CONCLUSION

[66] The present application for stay and a restraining order effectively is in the nature of an injunction. The respondents and intervener cannot be injuncted or restrained based on the authorities explained. There are also no special circumstances in this case for the applicant. The arguments of the applicant are also more suited for the judicial review applications and not the present application.

[67] For all the reasons adumbrated, the respondents and intervener's rights in respect of the land acquisition should not be delayed. Therefore the present application of the applicant for a stay and restraining order is dismissed with costs.

Applicant's application for stay and restraining order dismissed with costs.

Reported by Mohd Kamarul Anwar